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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5338

BERNARD H. BYNUM
PETITIONER,

-V-

UNITED STATES OF AMERICA
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BERNARD H. BYNUM - Pro se
34850

SEPTEMBER 7, 1979

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Bernard H. Bynum, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the imposition of a special parole term in conjunction with a term of imprisonment for violation of 21 U.S.C. Section 846.

Opinions Below

The Court of Appeals for the Fourth Circuit affirmed (No. HM 75-0363) the denial of the District Court.

Jurisdiction

The order of the Court of Appeals affirming the District Court's denial of petitioner's Motion was filed August 15,1979. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Whether a special parole term for a violation of 21 U.S.C. Section 846 lacks statutory provision as required by the United States Constitution.

Constitutional Provisions Involved In The Case

Article III, Section I: The Judicial Power of the United

States, shall be rested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

Statement of the Case

The petitioner was convicted in the United States District Court For The District of Maryland, January 15,1976, upon his plea of guilty to the criminal offense of conspiracy to violate the narcotics law, under 21 U.S.C. Section 846. This case was heard before the Honorable Herbert F. Murray, who sentenced the petitioner to a term of twelve (12) years in the United States Federal Prison. That in additional to said sentence of twelve (12) years, the petitioner was sentenced to serve an additional three (3) years on special parole.

Reason For Granting the Writ

Special parole terms for violation of U.S.C. Section 846, have created severe conflict in the Circuits, requiring this Courts' resolution.

Argument

The petition pleaded guilty to one of a two count indictment. The plead which was entered was to conspiracy in violation of 21 U.S.C. Section 846. The second count charged was a violation of 21 U.S.C. Section 841(a)(1), to which the Government entered a nolle prosequi. Therefore the plead of guilty was soley to 21 U.S.C. Section 846.

The petitioner contends that his special parole sentence of three (3) years is void and unconstitutional in that it was imposed without there being any statutory provisions authorizing the imposition of a special parole term within 21 U.S.C. Section 846. This section reads as follows:

> Any person who conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximun punishment prescribed for the offense.

It is admitted that the imposition of a special parole term under a conviction based on 21 U.S.C. Section 841(a)(1), is strictly legal. However, the crime for which this petitioner was convicted of is not the substantive offense of knowingly or intentional possessing with intent to distribute a controlled substance as prohibited under

21 U.S.C. Section 841(a)(1), but rather a conviction of conspiracy which is punishable by the provisions set forth in 21 U.S.C. Section 846. Mearns vs United States, Nos. 79-1044, 145 & 1046(3rd Circuit filed June 15,1979); Jacquinto vs United States, 464 F. Supp 728(3rd Circuit 1979); Fassette vs United States, 444 F. Supp 1245(9th Circuit 1978).

The decision of the Fourth Circuit, Burman vs United States, 584 F. 2d 1354(1978), contends that such a narrow construction of 846 would be overly technical in that 846 sets no penalties by its own term and instead clearly contemplates that punishment for conspiracy be set by reference to the substantive offense for sentencing under the statute 841(b). This section 841(b) provides for sentencing for convictions under Section 841(a)(1), which reads:

> "the manufacture, distribution, or possession with intent to distribute, of specified controlled substance is a criminal offense and shall be sentence as follows"; such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both...any person sentencing that imposed a term of imprisonment under this paragraph shall, in the absence of a prior conviction, imposed a special parole term of at least 3 years in addition to such term of imprisonment.

Petitioner contends that by being sentenced under the statutory provision of 21 U.S.C. Section 846, his term of imprisonment does not fall under the paragraph in 841(1)(a), imposing at least 3 years special parole in addition to such term of imprisonment as punishment. Jacquinto vs United States, 464 F. Supp 728(3rd Circuit 1979):

> On its face, 846 does not provide for the imposition of a special parole term. Parole, by its very definition, is a penalty which is distinct from imprisonment; it is a term of supervision served outside a penal institution. All 846 provides is that any fine or prison term imposed for conspiracy may not exceed the maximun fine or term of imprisonment permissable for the substantive violation. Aside from the plain meaning of the term "parole" and "imprisonment", further evidence that Congress did not intend to authorize the imposition of special parole under Section 846 is provided by the enumeration of all three penalties(fine, imprisonment, and special parole) under Section 841 and 845(prohibiting distribution to person under age 21) but of only the first two under Section 846. Indeed, the "special parole" term is referred to under Section 841 and 845; Section 846 is not mention

As Judge Hill stated in Fassette vs United States, 444 F. 1245(C.D. Cal. 1978):

> (i)f Congress had intended and had desired to have the permissible punishment for the conspiracy offense of Section 846 identical with that permitted for the substantive offense of Section 841, it could easily and clearly have said so. Instead, Congress had used the language in Section 846 which separately defines the permissible punishment for violation of that section and uses different language in defining it.

Also Judge Stapleton has recently adopted the Fassette holding in Mearns vs United States, Nos. 79-1044, 1045 & 1046(3rd Circuit filed June 15,1979). The Court of Appeals for the Tenth Circuit, however, has held that Section 846 does authorize a court to imposed a special parole term; The panel in United States vs Jacobson, 578 F. 2d 863(10th Circuit 1978), concluded that Congress viewed "special parole" as part of the term of "imprisonment". With all due respect to that panel, not only is its conclusion untenable, given the fact that "parole" and "imprisonment" are mutually exclusive, but in drawing its conclusion the panel:

> ignore(d) an important part of the language of Section 841 (b)(1)(a). That section provides that where a special parole term is mandated by a sentence of imprisonment, it is to be imposed in addition to such term of imprisonment. Thus, as used in Section 841, special parole is not merely part of imprisonment but considered to be something additional to the imprisonment. Mearns, supra,(emphasis added).

Judges, Lord and Stapleton, join together in declining to follow the holding in Jacobson, because of it being simply erroneous, also decline to follow United States vs Burman. In that case, the Fourth Circuit held that the imposition of a special parole term is required when imprisonment is imposed under Section 846, reasoning in essence that the "statutory scheme" requires that the penalties for conspiracy be identical to those for the substantive offense.

But the "statutory scheme" indicates otherwise; in enacting 21 U.S.C. Section 841, 845 and 846, it is clear that Congress has used the terms "fine", "imprisonment", and "special parole" to describe three distinct penalties, and that Section 846 provides for the imposition of only two of them. Since Section 846 is a criminal statute, it must be strictly construed. It is impermissible to read into that statute a penalty for which it makes no provision and to

which it does not refer, particularly since the legislative history reveals that Congress did not mean to authorize imposition of that penalty.

Should 846 be viewed as ambiguous, Ladner vs United States, 358 US 169, controls. When choice has to be made between two readings of what Congress has made a crime, ambiguity should be resolved in favor of lenity. This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.

Conclusion

In petitioner's Memorandum and Order it was mention that the Fassette case clearly supports petitioner's contention but the only difficulty is that this Court is governed by the decision of the United States Court of Appeals for the Fourth Circuit, United States vs Burman. In light of the forgoing it should be clear that the issue herein is in dispute throughout the circuits, and should be resolved by this court.

Affidavit of Service

State of Pennsylvania)
) SS. :
County of Union)

I, Bernard H. Bynum, verify that I have served, via United States Mail (certified, return receipt request) on September 7,1979, a copy of my Motion for Leave to Appeal in Forma Pauperis, Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis, and Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on: Solicitor General
Department of Justice
Washington, D.C. 20530

Pursuant to 28 U.S.C. Section 1746, I, Bernard H. Bynum, declare under penalty of perjury that my Affidavit of Service is true and correct.

Excuted on September 7,1979

Bernard H. Bynum

Bernard H. Bynum affiant

EXHIBITS

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-6293

United States of America,

Appellee,

v.

Bernard H. Bynum,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert L. Murray, District Judge.

Submitted: July 25, 1979. Decided: August 15, 1979

Before RUSSELL, Circuit Judge; FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

(Bernard H. Bynum, Appellant Pro Se. Russell T. Baker, Jr., United States Attorney, for the Appellee.)

EXHIBIT A

PER CURIAM:

Bernard H. Bynum appeals an order denying his motion to correct sentence filed pursuant to Rule 35, Fed. R. Crim. P. A review of the record, however, discloses that Bynum's claims were carefully considered and, in our opinion, properly disposed of by the district court.

Accordingly, for the reasons stated in the district court's Memorandum and Order, the denial is affirmed. United States v. Bynum, Crim. No. HM75-0363 (D. Md., April 9, 1979).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA :

v. : Criminal No. HM75-0363

BERNARD H. BYNUM :

...o0o...

MEMORANDUM AND ORDER

The defendant in this case has filed a motion under Rule 35 of the Federal Rules of Criminal Procedure claiming that his sentence was illegal. Rule 35 provides "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for reduction of sentence."

The defendant pled guilty to a charge of conspiracy to violate the narcotics laws under Title 21, U.S.C., Section 846. He was sentenced on January 15, 1976 to twelve years with a special parole term of three years.

Defendant's motion proceeds on two grounds. It is first contended that the special parole term of three years is invalid. Defendant maintains he was not convicted of the substantive offense of knowingly or intentionally possessing with intent to distribute a controlled substance as prohibited under 21 U.S.C. Section 841(a)(1), but was convicted only of conspiracy to violate that statute. Defendant concludes that such a conspiracy is not punishable by or under 21 U.S.C. Section 841(a)(1), but rather by the provisions set forth in 21 U.S.C. Section 846. He relies on the case of Fassette v. United States, 444 F.Supp. 1245 (C.D. Cal. 1978).

The Fassette case clearly supports defendant's contention The difficulty is that this court is governed by the decisions of the United States Court of Appeals for the Fourth Circuit, and that court has specifically held that imposition of a special parole term in conjunction with a term of imprisonment for violation of 21 U.S.C. Section 846 is not only proper, but mandatory. United States v. Burman, 584 F.2d 1354 (1978). In

EXHIBIT B

Burman, Circuit Judge K. K. Hall, speaking for the court, stated:

> "We think that a special parole term for violation of Section 846 was properly included in Burman's sentence. The conspiracy statute, Section 846, is punishable by a sentence which must be set by reference to the penalties of the substantive offense statute. A special parole term is automatically made part of the sentence prescribed by the substantive offense statute, 841(b), anytime imprisonment is included in the sentence. We think that under this statutory scheme such a special parole term is required as a penalty under Section 846 when a sentence of imprisonment is imposed because the substative offensive (sic) statute, 841(b), would so require it and the terms 'imprisonment or fine or both' only have meaning by reference to the sentences imposed under substantive offense statutes."
>
> Id. at 1358

Under the law as it exists in the Fourth Circuit, the first ground of defendant's motion is without merit.

The second ground of defendant's motion is that the court considered statements in the presentence report of the Probation Department which were false and untrue, and that this invalidates the sentence passed by the court. The alleged false and untrue statements are not specified in the motion except by reference to a letter dated August 29, 1978 to the undersigned judge which is attached to the motion as Exhibit "A".

In his August 29, 1978 letter, defendant states:

> "A reading of my presentence report would seem to indicate that I either initiated the criminal activity contained therein, facilitated it, benefited from it and/or supervised it, which is misinformation that has been prejudicial at the time of my sentencing by you, sir, and at my parole hearing that was held June 8, 1978.
>
> "The dates and events referring to the 'Circumstance Surrounding My Offense' are false and misleading. On these dates I was incarcerated in Allenwood Federal Prison Camp.
>
> "Stating even another error is when U.S. Assistant Attorney Radding said, 'that my responsibility was to bring Heroin into

the city from the West Coast and supervised the cutting house workers to street distribution.' This too is an unfound statement based on misinformation."

To this and other letters of similar tenor the court on September 18, 1978 responded as follows:

"Dear Mr. Bynum:

"You have written several letters to the court requesting that the court consider vacating your sentence. The claimed basis for the relief sought was a contention that erroneous information was contained in your presentence report which may have influenced the court in fixing sentence. Also, it was claimed that at the sentencing hearing, Assistant United States Attorney Radding made inaccurate statements to the court about your participation in the conspiracy.

"Although you have written me on June 22, July 25 and August 29, 1978 claiming inaccuracies in your presentence report, you have never specified what the inaccuracies are and the court knows of none. Therefore, the claimed basis for vacating your sentence is rejected.

"The court has obtained and reviewed the transcript of your sentencing hearing held on January 15, 1976. In his statement to the court, Mr. Radding indicated it was the government's information that you were the number two man in the narcotics organization run by Mr. Moore and that you helped supervise the girls in the cutting houses. He also stated that it was the government's information that you had traveled with Mr. Moore to the west coast.

"When you were provided by the court with the opportunity to make a statement in your own behalf or in mitigation of sentence, the only thing you contested was the accuracy of Mr. Radding's statement that you had made a trip to the west coast with Mr. Moore. You did not in any way contest the statements about the position you held in the conspiracy.

"The court considered the government's statement and your statement in fixing sentence and sees no reason whatever to alter the sentence originally imposed. I might further comment that in the statement you made to the court at time of sentencing, there was no indication on your part of any inaccuracy in the presentence report and the transcript of the sentencing hearing shows that your own counsel reviewed the presentence report and did not contest its accuracy.

Very truly yours,

(signed) Herbert F. Murray
United States District Judge"

While it is true that the defendant was confined at Allenwood, Pennsylvania Prison Camp from September 8, 1972 through December 17, 1974 on a prior narcotics conviction, the "Circumstance Surrounding Offense" section of the report detailing events occurring from September 23 through October 29, 1974 makes no reference to the defendant but rather relates to other individuals in the same operation. Specific reference is made to the defendant later on in the same section of the report at a time when the conspiracy was in active operation and defendant was out of prison on parole.

The court knows of no inaccuracies in the presentence report that in any way affected the sentence imposed, and the court took account of the fact that defendant denied making a trip to the West Coast. Under these circumstances there is no merit to the defendant's second contention, and therefore, it is this 9th day of April, 1979, by the United States District Court for the District of Maryland,

ORDERED:

(1) that defendant's "Application and Motion to Correct an Illegal Sentence" be, and the same hereby is, Denied; and

(2) that the Clerk of the Court is directed to mail copies of this Memorandum and Order to Bernard H. Bynum, Jr. and to the United States Attorney.

Herbert F. Murray
United States District Judge

Supreme Court, U. S.
FILED
OCT 31 1979
MICHAEL RODAK, JR., CLERK

No. 79-5338

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

BERNARD H. BYNUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5338

BERNARD H. BYNUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that imposition of a special parole term as part of his sentence for conspiracy to violate federal narcotics laws is unlawful.

Upon his plea of guilty, petitioner was convicted in the United States District Court for the District of Maryland on one count of conspiracy to possess a controlled substance with intent to distribute it, in violation of 21 U.S.C. 846.[1] Petitioner was sentenced to twelve years' imprisonment to be followed by a three-year term of special parole. Thereafter, petitioner filed a motion to correct sentence pursuant to Rule 35, Fed.R.Crim.P., claiming that imposition of the special parole term was not authorized by Section 846. The district court denied the motion (Pet. App. B), and the court of appeals affirmed per curiam (Pet. App. A).

The question presented in this case is identical to that presented in Bifulco v. United States, cert. granted, No. 79-5010 (Oct. 9, 1979).[2] In that case, the court of appeals held that it is proper to impose a special parole term for a drug conspiracy in violation of Section 846 whenever such a term is required for the substantive offense. Bifulco v. United States, 600 F.2d 407, 409-410 (2d Cir. 1979). With one exception,[3] every other court of appeals to have considered this question has reached the same conclusion. United States v. Sellers, No. 79-1107 (8th Cir. Aug. 7, 1979), slip op. 11-14; Cantu v. United States, 598 F.2d 471, 472 (5th Cir. 1979); United States v. Burman, 584 F.2d 1354, 1357-1358 (4th Cir. 1978); United States v. Jacobson, 578 F.2d 863, 867-868 (10th Cir.), cert. denied, 439 U.S. 932 (1978). See also United States v. Dankert, 507 F.2d 190, 191 (5th Cir. 1975).

We believe that the holdings in Bifulco and similar cases are correct, and that imposition of a special parole term as part of petitioner's sentence was therefore proper. Nonetheless, because this question is currently before this Court, the Court should defer consideration of this petition and dispose of it in light of the holding in Bifulco.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

OCTOBER 1979

1/ Upon acceptance of the plea, a second count charging a violation of 21 U.S.C. 841(a)(1) was dismissed.

2/ We are sending petitioner a copy of the government's response to the petition in Bifulco.

3/ United States v. Mearns, 599 F.2d 1296 (3d Cir. 1979), petition for cert. pending, No. 79-415.